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No. 198

In the Supreme Court of the United States

OCTOBER TERM, 1945

M. KRAUS & BROS., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 271–277) are reported at 149 F. 2d 773.

JURISDICTION

The judgment of the circuit court of appeals was entered May 31, 1945 (R. 278). The petition for writ of certiorari was filed July 5, 1945, and was granted October 8, 1945 (R. 279). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether a seller's act in compelling purchasers to buy chicken feet and chicken skin as a necessary condition to the sale of poultry to them at ceiling prices constitutes an evasion of maximum prices for poultry established by the maximum price regulation, irrespective of the fairness of the price charged for the feet and skin.

2. Whether the corporation which received the proceeds of such combination sales was criminally liable for the acts of its employees in making the sales.

3. Whether the trial court's refusal to permit defense counsel to examine statements used by the Government to refresh the recollection of its own witnesses constituted reversible error, where such prior statements were used only in an attempt to establish the personal participation of petitioner's president, who was acquitted.

4. Whether Government counsel's erroneous statement in his summation in respect of the maximum fine which could be imposed constituted reversible error where the trial judge specifically instructed the jury that they were not to consider the penalty in reaching a verdict.

STATUTE AND REGULATION INVOLVED

The Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, as amended, 50 U. S. C. App., Supp. IV, 901 *et seq.*, provides in pertinent part:

> SEC. 1. (a) It is hereby declared to be in the interest of the national defense and se-

curity and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. * * *

SEC. 2. (a) Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with

the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and effectuate the purposes of this Act.

SEC. 4. (a) It shall be unlawful * * * for any person to sell or deliver any commodity, * * * in violation of any regulation or order under section 2 * * *.

SEC. 205. (b) Any person who willfully violates any provision of section 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) [relating to the disclosure or use for personal benefit of official information by government officers] and for not more than one year in all other cases, or to both such fine and imprisonment.

Revised Maximum Price Regulation No. 269, issued December 18, 1942 (7 Fed. Reg. 10708), and reissued with amendments on October 8, 1943 (8 Fed. Reg. 13813), fixing maximum prices for poultry, provides in pertinent part:

SEC. 1429.5 *Evasion.* Price limitations set forth in this Revised Maximum Price Regulation No. 269 shall not be evaded whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to, the commodities prices of which are herein regulated,

alone or in conjunction with any other commodity, or by way of commission, service, transportation, or other charge, or discount, premium, or other privilege or other trade understanding or otherwise.

STATEMENT

Two informations, each in 6 counts, were returned against petitioner in the United States District Court for the Southern District of New York.[1] Each count upon which petitioner was convicted charged a wilful violation of the Emergency Price Control Act of 1942 and Maximum Price Regulation No. 269, Section 1429.5; it was alleged that, as an integral part of the sale of a specified amount of poultry, on a specified day in November, 1943, just prior to Thanksgiving,[2] petitioner demanded, compelled and required the buyer to purchase chicken feet or chicken skin, at a specified price, as a condition of the sale of the poultry (R. 2–9). The two informations were consolidated for trial (R. 10). Count 5 of the first information was dismissed at the close of the Government's case (R. 159) and petitioner was acquitted on counts 1[3] and 2 of the second information (R. 245). It was convicted on the

[1] We designate Information No. C117–64 (R. 2–5) as Inf. I, and the other Information, C117–65 (R. 6–9), as Inf. II. Petitioner's president, Max Kraus, was named as co-defendant in Inf. I, but was acquitted on the five counts submitted to the jury (R. 245).

[2] Thanksgiving in 1943 was on November 25.

[3] The acquittal on this count removes chicken gizzards from the case.

other counts and fined $2,500 on each, or a total of $22,500 (R. 245, 247–248). On appeal the judgment was affirmed, one judge dissenting as to the exclusion of evidence (R. 271–278).

Petitioner corporation has been engaged in the wholesale meat and poultry business in New York City for 20 years (R. 165) and has 35 employees (Pet. Br. 8). While it ordinarily did a gross business of seven or seven-and-a-half million dollars a year, its gross business during 1943 was not quite four million dollars (R. 178). The principal officers of the corporation are Max Kraus, president, his son, vice-president, and his brother, secretary and treasurer (R. 165, 177). There was a manager of the poultry department (Nathan Lotto) and also a manager of the meat department (William Harriss); there was a man in charge of each of the separate divisions of the meat department, lamb, beef, etc. However, these men were used in the poultry department in the holiday seasons. (R. 165–166, 182, 197.) The president of the corporation testified that most of his time was spent in the administrative office, which was not on the selling floor, and that he did not do any selling, but he conceded that he was at the office every day and would "go through the plant to see and ask the salesmen what they received, how things are moving and how things are selling" (R. 166–167, 170); that he did some buying and "importing" (R. 166, 179); that there

would be meetings with the employees at which "we go over matters, what is coming, what is selling, talk about customers"; that he kept his "fingers right on all conditions" (R. 178–179; see also R. 205); and that he gave the salesmen "certain authorities that they can buy and that they can sell" (R. 180).

While the salesmen were, according to the president, not instructed to push chicken feet or chicken skin and were paid salaries and not commissions, they were there for the purpose of selling whatever the corporation got and "if they wouldn't be a proper salesman I wouldn't have them there." (R. 177, 187–188.) The manager of the poultry department conferred with the president daily (R. 204). In November, 1943, the corporation had but "a small shipment in one car of chicken skin" but had "quite some feet on hand" (R. 189). The skin was all disposed of during the Thanksgiving season in 1943 and there were only about 4 or 5 barrels of feet left (R. 190, 215). Much of the chicken feet was "processed" by the corporation itself and was a "left over product" from its previous evisceration of chickens (R. 169, 182), but it was not denied by the president that some of the chicken feet may have been bought by the corporation at 3 cents a pound (R. 179–180). The president thought that the corporation paid for the chicken skins 23½ or 24½ cents a pound (R. 181).

While the corporation ordinarily received between 100 and 150 cars of turkeys between Thanksgiving and New Year, it received only one car of turkeys (thirty or forty thousand pounds) for Thanksgiving, 1943 (R. 202). The corporation had orders for more turkeys than it received and the president and the manager of the poultry department agreed that the turkeys should be rationed among the steady customers according to a list which was prepared (R. 202–203, 209–212). Customers who asked as to the prospects of obtaining turkeys were advised that the supply would be small but that the corporation would do the best for them it could (R. 213–214).

There was no dispute that the turkeys and chickens involved in the counts upon which petitioner was convicted were billed at ceiling prices fixed by the Office of Price Administration, as testified to by an official of that Administration (R. 155–156); there had been no ceiling price fixed for chicken feet or chicken skin.

The testimony of the retail dealers with reference to the transactions covered by those counts as to which the jury convicted may be summarized as follows:

Moskowitz (Inf. I, count 1, R. 2–3).

The Moskowitzes, father and son, were retail butchers who did a business of $100,000 a year, the father owning the place (R. 106). On November 24, 1943, Moskowitz's father told him to go to petitioner's market and pick up some

turkeys. He went to the market and was told that they had 10 boxes of turkeys for him (R. 108). The turkeys and 4 barrels of chicken feet were placed on his truck. While his father had not told him to pick up chicken feet, he was advised at petitioner's market that his father had bought them. (R. 111.) He was given 2 bills, one for $358.09 for turkeys (875 pounds), and one for $64.05 for chicken feet (427 pounds at 15 cents per pound) (R. 112, Exs. 14 and 15, R. 106.) Both bills were paid (R. 113). The chicken feet could not be sold and were "dumped" (R. 112). No complaint was made because "we were lucky to get any merchandise" (R. 126). *Braverman* (Inf. I, counts 2, 3, 4, R. 3–4).

Max Braverman, a retail butcher doing a gross business of about $60,000 a year, had been trading with petitioner for about 12 years and customarily bought turkeys and chickens during the holiday season (R. 82–83). On November 23, 1943, he spoke with one of petitioner's employees, identified only as "Jack",* and he begged him to save a few boxes of turkeys (R. 84). The next day Braverman went to petitioner's place of business and waited for about 2 hours (R. 84). When his name was called by "Charlie", peti-

* At another point he indicated that he spoke to "Nathan" (R. 97, 98), presumably Nathan Lotto, the poultry manager (*supra*, p. 6). Lotto testified that he sold Braverman the 3 barrels of chicken feet which formed the basis of counts 2, 3 and 4 of Inf. I (R. 197).

tioner's lugger placed on Braverman's truck 2 boxes of turkeys and some chicken feet or gizzards (R. 84–85). At 3 different times on that same day Braverman also bought a barrel of chickens and each time he was billed by "Oscar"[5] for the chickens at ceiling prices, and was also charged on each sale for 5 pounds of chicken feet at 20 cents per pound (R. 86–87, 229, Exs. 10–12, R. 83). Braverman testified that he paid for the chicken feet but did not buy them (R. 86–87, 229). He stated that his store was in a poor neighborhood on the East Side and he sold the feet because in his section you could sell whatever you got (R. 88).

Zweben (Inf. 1, count 6, R. 5; Inf. 11, count 3, R. 7).

Zweben, who did a business of $85,000 a year, had been buying poultry from petitioner for 8 or 10 years (R. 141, 147, 149). He placed an order for turkeys with Willie Kraus, a nephew of petitioner's president. He was told that turkeys would be very scarce but that he would be put down for some as he was a steady customer (R. 143). On November 22 he waited at petitioner's place of business for most of the day, and saw the butchers carrying out boxes of turkeys and boxes of chicken feet (R. 144, 146).

[5] An OPA investigator who interviewed Braverman testified that Braverman did not mention any "Oscar" or "Jack" to him (R. 102).

His name was called, and he was told by Willie Kraus that he would be given several boxes of turkeys (R. 144). When he went to the bookkeeper, Mr. Balter, to receive his bill, he was asked "How about some chicken skin?" He replied, "All right, I will take some chicken skin." (R. 144–145; but cf. R. 150.) He had never before purchased or sold chicken skin (R. 145). He was charged $160.53 for 4 boxes of turkeys (358 pounds) and $30 for 4 boxes of chicken skin (100 pounds at 30 cents a pound) (Exs. 17 and 18, R. 147). On November 24 he purchased from "Meyer" 4 boxes of turkeys, and was asked if he could use some chicken feet. He said "All right, I will take some chicken feet" (R. 150). He testified that "I figured they do me a big favor by selling me turkeys and it is not more than right to take the chicken feet, even though I did not know whether I was going to sell them or not. I never bought chicken feet before" (R. 148, 150). He was billed $166.01 for 4 boxes of turkeys (378 pounds) and $33.90 for two barrels of chicken feet (226 pounds at 15 cents a pound) (Exs. 19 and 20, R. 447). He did not take the chicken feet at the time, but called for them about two weeks later (R. 151, 154). He sold some at 15 and 10 cents a pound and gave the balance to his customers (R. 154).

Cuet (Inf. 11, count 4, R. 8).

Cuet, who did a business of about fifty or sixty thousand dollars a year, had been trading with petitioner for about 5 years (R. 65–66). On November 24 he telephoned a man named "Jake" and told him that he needed some turkeys. He was informed that he would receive his share. (R. 67.) He drove his truck to petitioner's place of business and waited outside. Two boxes of turkeys and one box of chicken feet were loaded on his truck. (R. 68.) He signed two bills, one for $96.54 for turkeys (211 pounds), and one for $16.50 for chicken feet (110 pounds at 15 cents a pound) (R. 68; Exs. 6, 7, R. 67). He paid both bills (R. 68–69). He did not ask for the chicken feet, and had never before sold this product (R. 69, 71). He sold a few pounds at 15 cents, and gave away the balance (R. 69–70).

Kuenzlen (Inf. II, count 5, R. 8–9).

Kuenzlen, who did about sixty-five or seventy thousand dollars business a year, had been trading with petitioner for about a year and a half, but his father had been petitioner's customer for about 25 years before that (R. 54). He had never had a customer who requested chicken skins (R. 54). On the morning of November 22 he asked "Nat", one of petitioner's employees, if he could have some turkeys and was told to return in the afternoon (R. 56). That afternoon he waited for several hours until his name was called and then had the turkeys allotted to him loaded on

his truck (R. 56). When he went outside, his chauffeur said "You have 3 cases there." He found that 3 boxes of chicken skin had been loaded on his truck; he had not told "Nat" he wanted chicken skin. (R. 56–57). He was given two bills to sign, one for $152.38 for the 3 boxes of turkey (340 pounds), and one for $22.50 for the 3 boxes of chicken skin (75 pounds at 30 cents a pound) (R. 57; Exs. 4 and 5, R. 55). He "made no protest because of the condition today" (R. 56). He sold two pounds of the chicken skins at cost and gave the remaining 73 pounds to a charitable institution (R. 58–59).

Klein (Inf. II, count 6, R. 9).

Klein, whose business ran around $65,000 a year, had been dealing with petitioner for about 30 years (R. 71–72). On November 23 he was told that he could have 2 boxes of turkeys (R. 74). When he called for the turkeys, he was given 2 bills by Blankenstein, one for $89.18 for the turkeys (205 pounds), and 1 for $15 for one barrel of chicken feet (100 pounds at 15 cents per pound) (R. 75; Exs. 8 and 9, R. 74); and the turkeys and chicken feet were loaded on his truck by petitioner's men (R. 75). He paid both bills (R. 75). He sold about 15 pounds of the feet and gave away the rest (R. 77–78). He had not theretofore bought chicken feet but had occasionally sold some, which he had cut from his own chickens, for the purpose of making soup (R. 72–73, 76).

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In defense, Bungard, a retail butcher, was called for the purpose of establishing that there was a demand for chicken feet and chicken skins which he had bought from petitioner (R. 161–162). When the court asked petitioner's counsel the purpose of the testimony, petitioner's counsel replied (R. 162):

> * * * I intend putting in testimony here to show that there is and has been a demand for chicken skins, chicken feet, gizzards, that they are customarily sold; that they are bought; that they are dealt and traded in. The government has inferred through all of its testimony that chicken skin and chicken feet are so much waste, that they are dumped; that they are not used and they have opened up the door to this type of testimony.

The trial court ruled (R. 162):

> I do not think the government ever put in issue whether or not there was a demand for chicken feet. There has been a demand for chicken feet for some purpose or other. The only thing we are concerned with is whether or not the witnesses who testified purchased chicken feet to meet a demand in their stores.[6]

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[6] At an early stage of the case the trial court had indicated that the fact that chicken gizzards had not been sold above the ceiling price in conjunction with the sale of poultry was of no materiality, saying "As I understand it, your client is charged with having forced this man to buy gizzards in order to bill up the price. I don't care whether they are

Subsequently, petitioner's counsel stated that he wished a ruling as to whether witnesses would be allowed to testify that in their "particular neighborhoods" there was a demand for chicken feet, skin, and gizzards. The court stated, "It is not only unnecessary but I direct you not to do it." R. 163).

Petitioner's president denied that he personally made any of the sales as to which the Government's witnesses testified or that he had instructed in those instances, or generally, that the sale of poultry be conditioned upon the purchase of chicken feet or chicken skin (R. 170–171, 172, 174, 177, 191). Petitioner's poultry manager, Nathan Lotto, testified that he sold the three barrels of chickens to Braverman and asked him to buy chicken feet, but denied that he required him to do so in order to get the chickens (R. 197). He also denied that he compelled any of the Government witnesses, or, indeed, any customer, to buy poultry parts in order to obtain poultry or that he was instructed by the president of the corporation to impose such a condition (R. 198, 203). Several of the per-

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covered by the regulations or not. He is not charged with violating the price of gizzards but billing up the price of chickens." (R. 37.) When it was stated that the ceiling price on gizzards was a certain amount, the court further stated, "Well, I have no interest in that. I wouldn't care if it was fifteen dollars. You have your concession." (R. 38.)

sons mentioned by the Government witnesses were identified by the president and the poultry manager as salesmen (R. 182, 208, 209).

On cross-examination, petitioner's president was questioned about the resale value of chicken skins from the retailer to the general public and he replied that the value was from 25 to 30 cents a pound, that the skin was utilized to produce chicken fat, which was used in the manufacture of chicken salami, patties, and by a "foreign element" for other purposes (R. 183–184). He also testified that the chicken feet had a resale value of from 12 to 16 cents a pound and were used in making soup and gelatin (R. 186). He was further asked, on recross-examination, whether the demand for chicken feet had come from "processors" or from the "ordinary family butcher" and answered that the demand came from retail butchers such as had been on the stand (R. 191). Petitioner's counsel then recalled to the stand Bungard, one of the retail butchers whose testimony had originally been excluded (*supra*, p. 14). This witness testified that he had "created a demand" for chicken feet in his store and had sold it for from 15 to 20 cents a pound (R. 195–196). Petitioner called no further witnesses to testify as to the retail value of chicken feet and skins, although there was an over-night adjournment after Bungard concluded his testimony before the defense rested (R. 216).

In submitting the case to the jury, the trial judge charged that "what these defendants are charged with having done is imposing as a necessary condition to the purchase of turkeys the simultaneous purchase of gizzards, chicken feet or chicken skin, that were utterly useless and valueless to the purchaser." (R. 241.)[7] He subsequently told the jury, "The one question in the case is whether the sale of the chicken skin and feet was a necessary condition to the purchase of the other [the poultry]." (R. 241.)

SUMMARY OF ARGUMENT

I

a. The informations were drawn and the case was tried on the theory that petitioner was guilty of an evasion of maximum prices if it required the retailers named in the information to purchase chicken skin or chicken feet as a necessary condition to the sale of poultry to them at ceiling prices. There was ample evidence to warrant the

[7] In response to an exception to the statement that chicken skins and gizzards and feet were utterly useless to the purchaser, the court stated: "Well, I don't know. I think I modified that to the extent that the evidence showed. I have already told you that any statement of fact about it being utterly useless—there was testimony that they had disposed of some pounds of chicken feet." (R. 243.) Cf. the statement in the charge at R. 242, where the trial judge said that "none of them [the purchasers] had any disposition for it [the feet or the skins] and none of them succeeded in disposing of it with the exception of a few pounds." See also R. 239–240.

jury's conclusion that, as charged in the information, the purchases of these secondary products were compelled.

b. Petitioner's action in compelling purchasers to buy a secondary commodity in order to obtain poultry was an evasion of the maximum prices established for poultry, irrespective of the fairness of the price charged for the secondary product. In return for the sale of poultry, petitioner received the ceiling price plus something more, i. e., an additional sale which it would not have effected except as consideration for the poultry. Similarly the purchasers were required to pay more than ceiling prices for poultry whether or not they could later sell the secondary product, for at the moment of sale, in order to get poultry, they had to expend more than the ceiling price. In this case, it is particularly clear that the purchasers paid more than the ceiling price for they could make no use of the secondary products they were compelled to buy.

The practice of compelling the purchase of secondary products was directly prohibited by the regulation fixing the prices of poultry, which provided that price limitations should not be evaded by direct or indirect methods in the sale of a regulated commodity alone or in conjunction with any other commodity. The general interpretation of maximum price regulations by the Administrator and by all courts which have considered the ques-

tion supports the view that compelled purchases constitute an evasion of price limitations.

c. Since petitioner's action in compelling purchasers to take chicken feet and skin in order to get poultry was, in fact, an evasion of maximum prices for poultry, the trial judge would have committed no error had he adhered to his original ruling excluding evidence offered by petitioner to prove that chicken feet and chicken skin had some general value. It is clear that petitioner offered this evidence merely to establish its theory that a compelled sale of a secondary product is not an evasion if the secondary product is sold at a fair price, and that he did not intend to offer evidence of such a general demand for the secondary products as would tend to show that petitioner had no motive to compel a sale.

Moreover, testimony on the existence of a general market was later allowed in evidence and there is nothing to show that the judge's original ruling kept petitioner from calling additional witnesses if it had wished to do so. The evidence offered by petitioner showed that the retail value of chicken feet and skin was approximately the same as the price for which petitioner was selling the products at wholesale and that the market for these products was a specialized one. It is thus clear that the evidence had no probative value on the issue of compulsion.

II

Since the compelled sales of chicken skin and feet were effected by salesmen acting within the scope of their employment for the benefit of the corporation in the business of the corporation, corporate criminal liability was established. The extent to which an agent may render the corporation criminally responsible depends on the nature of the act for which liability is to be imposed. Here the offenses involved were sales, and the persons authorized to perform the corporate function of selling were necessarily salesmen. Hence the corporation was properly held liable for the acts of its salesmen.

III

The court refused defense counsel's request for permission to examine statements shown to Government witnesses in an effort to refresh their recollection as to whether petitioner's president had personally participated in making sales to them. Since the statements were used in an endeavor to establish this one fact, the acquittal of petitioner's president renders academic the question whether it was reversible error to deny counsel's request.

IV

In his summation the prosecutor made an erroneous statement of the maximum fine which could be imposed under the statute. Such error

was cured by the judge's reiterated instruction to the jury that it was not to consider possible penalties in reaching its verdict.

ARGUMENT

I

A SELLER WHO COMPELS A PURCHASER TO BUY ANOTHER COMMODITY IN ORDER TO SECURE A PRODUCT SELLING AT THE CEILING PRICE IS GUILTY OF AN EVASION OF THE PRESCRIBED MAXIMUM PRICE FOR THE DESIRED COMMODITY, IRRESPECTIVE OF WHETHER THE SECONDARY COMMODITY IS SOLD AT NOT MORE THAN THE CEILING PRICE OR AT A FAIR PRICE IF NO MAXIMUM PRICE HAS BEEN ESTABLISHED. HENCE, EVIDENCE THAT ONLY A FAIR PRICE WAS CHARGED FOR THE SECONDARY PRODUCT IS IRRELEVANT

a. The informations were drawn and the case submitted to the jury, as petitioner indicates (Br. 21–22, 28), on the theory that petitioner unlawfully evaded Revised Maximum Price Regulation 269, fixing prices for poultry, if it required the retailers to purchase chicken skin or chicken feet as a necessary condition to the sale to them of poultry. The sufficiency of the evidence on this theory is not here questioned. All the counts on which petitioner was convicted were based on sales in the period from November 22 to November 24, 1943, just before Thanksgiving. That the demand for poultry at that time far exceeded the supply is a matter of common knowledge and is established by the evidence. Thus, petitioner's poultry manager testified that he and petitioner's president arranged

for the rationing of turkeys among customers for the holiday season (R. 202–203, 209–212); one Government witness testified that he "begged" petitioner for turkeys (R. 84), and another that he thought he was receiving a "big favor" by being allowed to purchase turkeys (R. 150). The jury was justified in finding that, under the prevailing conditions of the market, the purchases of chicken feet and chicken skin by Government witnesses were compelled. Despite the reluctance of the witnesses, the evidence is clear that none of them wanted chicken feet or skin or had any real market for these products. With the exception of Moskowitz and Zweben all of them testified that, without previous order or solicitation, the feet and skin were loaded on their trucks together with the poultry, or that they were billed for both commodities without comment. Such action was as explicit as words that the poultry would be sold only in conjunction with the feet or skin. While Moskowitz stated that, when he saw the chicken feet being loaded on his truck, he was told that his father had ordered them, he also testified that his father had not told him to pick up any chicken feet; that they could not sell the chicken feet and had to "dump" them, and that they did not complain about being billed for the feet because they "were lucky to get any merchandise." The jury was entitled to find, we believe, that Moskowitz's

purchase of the chicken feet was not voluntary. As to Zweben, the evidence establishes that he waited at petitioner's place of business most of the day and saw customers carrying out both turkeys and chicken feet. Hence, although he testified that he was asked and agreed to purchase the additional commodities, the jury could properly conclude that his assent was based on his awareness that he could not obtain the poultry which he wanted without making the additional purchases. It is significant that Zweben did not specify the quantity of chicken feet or skin which he wished to purchase but merely accepted the amount given to him by petitioner's employees.

b. Contrary to petitioner's contention (Br. 21–28), petitioner's action in compelling purchasers to buy chicken feet and chicken skin as a necessary condition to the sale to them of poultry was, we submit, an evasion of the maximum prices for poultry established by Maximum Price Regulation 269, irrespective of the fairness of the prices charged for the feet and skin. Maximum Price Regulation 269 fixes the price of poultry at a certain sum per pound. Petitioner did not sell the poultry at such price alone; on each particular sale, it received the ceiling price plus something more, the additional sale of another article. It is of no significance that an independent sale of chicken skin or chicken feet at the prices charged might have been valid. The fact re-

mains that the particular sales of chicken feet and chicken skin here involved would not have been effected except as consideration for the poultry sold. Manifestly, petitioner considered the making of such sales of value, or it would not have exacted this extra consideration. It thus received, as the price of the poultry sold, the ceiling price established by the Regulation, plus the benefits, whatever they might have been, resulting from the particular sales of chicken feet and chicken skin to these particular customers. If, instead of chicken feet and chicken skin, a wholesaler decided to sell his furniture and required each retailer to purchase an article of furniture with each barrel of poultry, it could not seriously be contended, we think, that the poultry was sold at ceiling price merely because the furniture may have been worth the price placed on it as a condition of the sale. The ability to dispose of merchandise is itself a thing of value. It is to be noted that Section 302 (b) of the Act (50 U. S. C. App., Supp. IV, 942 (b)) defines price as "the consideration demanded or received in connection with the sale of a commodity." Here the evidence shows that, by the end of the holiday season, petitioner had disposed of almost all the chicken feet and all the chicken skin it had on hand, thus indicating clearly that it had received a substantial benefit in addition to the established ceiling price, by requiring pur-

chasers to take chicken feet and chicken skin in order to get poultry.[8]

Similarly, the purchasers in this case paid more than ceiling prices for the poultry. In order to get the poultry which they needed they had to buy chicken skin and chicken feet which they did not want. Whether or not they sold the chicken feet and chicken skin later, the fact is that they could not purchase poultry for the ceiling price established by the Regulation; at the moment of sale they were required to expend more than the ceiling price to get the desired article. To illustrate, a man who has only $5 to spend for a Thanksgiving turkey, the ceiling price for which is $5, can not buy a turkey for $5 if, in addition, he is required to buy a chicken for $2, even though the chicken may be worth $2, and a person with $7 to spend might buy both. Also, the man with $7 who has to pay it out to obtain a $5 turkey, is in effect paying the $2 additional in order to get the turkey. The necessity of making an undesired purchase is therefore in itself an additional burden to the purchaser and thus a consideration beyond the

[8] Presumably petitioner received a profit on its sales of chicken feet and skin (see p. 7, *supra*), and while it is true, as petitioner indicates (Br. 52), that the total purchases of chicken feet and skin involved did not exceed $200, it was brought out at the time petitioner was sentenced (R. 246–247) that during the 9 months' period from April 1, 1943, to December 31, 1943, its volume of business in chicken feet, skin, and gizzards, was about $19,000.

established price. The case before this Court is even stronger because mathematically it is easy to demonstrate that the purchasers paid more than ceiling prices for the poultry alone, since the evidence is clear that they could not recoup the price they paid for chicken skin and chicken feet. The witness Kuenzlen, for example, paid $152.38 for 340 pounds of turkey, and $22.50 for 75 pounds of chicken skin. He sold 2 pounds of the chicken skin at 30 cents a pound and gave the rest away. Thus, the actual cost to him of the 340 pounds of turkey was not $152.38 but $174.28, or almost 7 cents extra per pound.

The practice adopted by petitioner was directly prohibited by Maximum Price Regulation 269, which provided in Section 1429.5 that "Price limitations * * * shall not be evaded whether by direct or indirect methods, in connection with any * * * sale, delivery, purchase or receipt of, or relating to, the commodities prices of which are herein regulated, alone or in conjunction with any other commodity * * *." Petitioner attempts to attach significance to the absence from this regulation of the words "tying agreement" which appear in other Maximum Price Regulations and in a later revision of Maximum Price Regulation 269, effective January 1, 1945, a year after the sales involved herein. (Sec. 1.3 (d); 9 Fed. Reg. 15095.) However, there is nothing to indicate that the term "tying agreement" has

a well-defined meaning in the wholesale poultry business, and the revised Regulation does not disclose that such a practice as that of petitioner had been regarded as outside the scope of the prior Regulation.[9] The Regulation here involved plainly prohibits an evasion of maximum prices by any method, direct or indirect, and forbids such evasion whether it occurs in connection with a price-regulated commodity "alone, or in conjunction with any other commodity." Hence if, as we submit, petitioner's practice of compelling the purchase of a secondary product constituted, in fact, an evasion of price limitations, it was in violation of the Regulation just as much as if the Regulation had designated the practice as a "tying agreement", "combination sale", or had used some other description. Cf. *Edelmann* v. *Bonded Liquors, Inc.*, OPA Desk Book, 2 Opinions and Decisions 2211 (Municipal Court, Los Angeles); see also *Brown* v. *Banana Distributors*, 52 F. Supp. 804, 805 (D. Conn.).

The Price Administrator has consistently maintained the position that compulsion to purchase a secondary product is an evasion of the maximum prices fixed for the primary product. For example, in an interpretation issued November 5, 1943 applicable to all Maximum Price Regulations (O. P. A. Service (Pike & Fischer) vol. I p. 2:812), the Administrator, in discussing evasion,

[9] The words "tying agreement" were added without definition.

made the following interpretations as to tying agreements:

> (a) *As to freeze regulations.*[10] A purchaser may not be required to buy a combination of commodities if he was not required to do so during the base period, because such an arrangement is a tying agreement which results in the seller receiving a larger consideration for his commodity than he charged during the base period.
>
> (b) *As to regulations other than base period freeze regulations.* OPA has also consistently held that any arrangement by which a seller conditions the sale of a commodity in any manner upon the purchase by the buyer of any other commodity is a tying agreement, and constitutes a violation. *For example*, it is a violation for a seller to compel a purchaser of a load of corn to also purchase a load of alfalfa, even though the total price for the corn, plus the alfalfa, does not exceed the aggregate of the ceiling price for each item, or another example: It is a violation for a seller to compel a purchaser of nylon hose to also purchase a war bond.

The interpretation placed by the Price Administrator on his own regulations is controlling unless clearly erroneous or inconsistent with the

[10] Revised Maximum Price Regulation 269 is not a freeze-type regulation. It establishes maximum prices for poultry in terms of dollars and cents, and not in terms of prices charged during a prescribed prior base period.

regulations. *Bowles* v. *Seminole Rock & Sand Co.*, No. 914, O. T. 1944, decided June 4, 1945. As we have shown, this interpretation is in accord with the specific regulation here involved, and is factually sound. All the courts in which the question has been presented have taken the same position, even in circumstances where the secondary product is more clearly an article of value to the purchaser than the chicken feet and chicken skin involved in the present case. *United States* v. *Armour & Co.*, 50 F. Supp. 347 (D. Mass.), and *Bowles* v. *Cudahy Packing Co.*, 58 F. Supp. 748 (W. D. Pa.) (sales of eggs tied to butter); *Brown* v. *Banana Distributors*, 52 F. Supp. 804 (D. Conn.), and *Bowles* v. *Inland Trading Co.* (N. D. Ind.), O. P. A. Desk Book, 2 Opinions and Decisions 2223 (sales of vegetables and other fruits tied to bananas); *Bowles* v. *Coffin-Redington Co.*, O. P. A. Desk Book, 3 Opinions and Decisions 2072 (N. D. Calif.), and *Edelmann* v. *Bonded Liquors, Inc.*, O. P. A. Desk Book, 2 Opinions and Decisions 2211 (sale of other liquor tied to whiskey); see also *Bowles* v. *Stafford*, 1 Price Control Cases (C. C. H.) p. 51692 (W. D. La.), in which the court indicated that a compelled purchase of other liquor in order to get whiskey would have been a violation but found that there was no compulsion in the case before it.

We submit that these decisions are clearly correct. The Emergency Price Control Act was designed to "stabilize prices and to prevent specu-

lative, unwarranted, and abnormal increases in prices," and to eliminate "profiteering * * * resulting from abnormal market conditions or scarcities * * *" (Sec. 1, *supra*, pp. 2–3). The inflationary effect of such a practice as that resorted to by petitioner is well stated by the court in *Edelmann* v. *Bonded Liquors, Inc., supra*, where the court said:

> In the case at hand the plaintiff, in order to obtain bourbon whisky, was required to purchase another commodity [gin], whether or not he wanted such other commodity. Consequently, the amount which he paid for this commodity would, in effect, be paid in order to obtain a bottle of whisky. The value of plaintiff's dollars thereby became less when, to buy one article, he had to buy something else in addition, with the result the inflationary spiral was started on its way. It takes little imagination to conceive what would happen if the defendant and others were permitted to circumvent the purposes and objectives of the Act in the manner described. Persons in control of scarce articles, like refrigerators, radios, stoves, and other essential household goods, could by reason of such practice unload quantities of plentiful and unwanted articles on the market, with the result the value of the purchasers' dollars would shrink and the cost of goods would rise. The fact that the charges made for the "tied-in" commodity and the desired article were in the aggregate not in excess

> of the maximum prices for such articles would not in any sense lessen the inflationary tendencies of such practices, nor make such practices any less in conflict with the purposes Congress sought to achieve by enactment of the Emergency Price Control Act.

The possibilities of profiteering by unloading plentiful unwanted commodities on purchasers who desire scarce commodities are obvious. Cf. *United States* v. *Armour & Co., supra,* 50 F. Supp. at p. 349. Moreover, where, as here, the secondary product is purchased by a retailer who cannot sell the secondary product, he is inevitably under a temptation to try to recoup his losses on the secondary product by himself selling the scarce commodity at above-ceiling prices. Permitting sellers to obtain additional compensation by way of compelled purchases of secondary products would thus increase the danger of black markets, and render more difficult the task of enforcing price control.

c. Petitioner's argument that the trial court erred in excluding evidence as to the general market value of chicken feet and chicken skins (Br. 28–32) rests on its contention that the compelled sale of a secondary non-price regulated article is not an evasion of the ceiling price on the primary product if the secondary article is sold at a fair price. Since, as we have shown, this premise is untenable, it follows that the trial

judge would have committed no error had he adhered to his original ruling that the evidence of market value was not admissible for the purpose for which petitioner offered it. As the trial judge stated, "There has been a demand for chicken feet for some purpose or other. The only thing we are concerned with is whether or not the witnesses who testified purchased chicken feet to meet a demand in their stores," (R. 162) i. e., whether the purchase of the secondary commodity was compelled. That this was the trial judge's theory of the case clearly appears from his later statement in his charge that "The one question in the case is whether the sale of the chicken skin and feet was a necessary condition to the purchase of the other [the poultry]" (R. 241; see also R. 38–39).

The dissent in the court below (R. 277) is based on the theory that proof of the existence of a market for chicken feet and chicken skin was relevant to the issue of intent, presumably on the theory that such proof would tend to negate the existence of compulsion on the part of the seller. It is clear, however, that the testimony was not offered for such purpose. Petitioner was merely trying to establish that chicken feet and chicken skin were not worthless to retailers; it was not attempting to prove that the demand was so great that petitioner would have no motive to compel a sale. Trial counsel, in offering the evidence as to the market value,

stated that the Government had inferred that the feet and skin were wasted, and that he therefore wanted to prove that they were customarily sold; that they are "dealt and traded in" (R. 162). Subsequently, he stated that he wished to call witnesses who would testify that "in those particular neighborhoods" feet, skin, and gizzards were sold (R. 163). Manifestly, all that petitioner hoped to establish was that some retailers could sell chicken feet, a fact which would have little, if any, probative value on the question of whether the particular witnesses who testified for the Government bought feet and skin voluntarily or were compelled to take these commodities in order to get poultry.

Furthermore, evidence as to general demand and resale value was finally permitted. As appears from the statement (*supra*, p. 16), petitioner's president was cross-examined as to the existence of a market for chicken feet and chicken skins and their retail value, and petitioner then recalled the witness Bungard, one of the retailers whose testimony had originally been excluded. This witness was then permitted to testify that he had "created a demand" for chicken feet in the store and had sold it at between 15 and 20 cents a pound. We think there is no basis in the record for the dissenting judge's opinion that the original ruling by the trial judge barred petitioner from then offering the testimony of other retailers (R. 277). There was an

over-night adjournment after petitioner's president had testified and the witness Bungard had been recalled (R. 216). Assuming, as did the dissenting judge, that petitioner's other witnesses had been excused after the trial judge's original ruling, the witnesses, all presumably from the metropolitan district, could easily have been summoned to reappear the next day. In view of defense counsel's care throughout the trial to take exception to adverse rulings, it is reasonable to assume that, if he were unable to call witnesses whom he wished to present, he would have so stated. Petitioner's counsel may very well have felt that the testimony of petitioner's president and of the witness who had been recalled had sufficiently covered the subject, for, as appears from his own statement when he originally proposed to call the witnesses, the testimony of others would have been merely cumulative (R. 163).

A consideration of the testimony which was offered as to the existence of a market indicates that such additional evidence would have had no probative value on the question of compulsion. According to petitioner's president, chicken skin is used to produce chicken fat which is utilized in the manufacture of chicken salami and patties and by "a foreign element" for other purposes (R. 184). He also testified that a demand for chicken feet for soup or gelatine had developed only in the last two years (R. 186). By his own admission, the retail value of skin was 25 to 30 cents a

pound, and the retail value of feet was 12 to 16 cents a pound (R. 184, 186), i. e., the retail value was approximately the same or less than the price for which petitioner sold the products at wholesale. This evidence, while it may have tended to prove the fact for which it was offered, i. e., that feet and skin are not utterly worthless, certainly did not tend to disprove compulsion. The fact that retail butchers could sell the product for the same or less than the price at which they bought it does not tend to establish a motive to buy, and the fact that there was a special market for these products in certain neighborhoods does not tend to dispel the existence of a motive to compel a sale. Since there was thus no real exclusion of evidence, and since the evidence offered had no significant probative value on the one issue to which it might have been material, i. e., the existence of compulsion in the sale, we submit that there is no foundation for the claim that the court erred in excluding evidence.

II

SINCE THE COMPELLED SALES WERE EFFECTED BY PERSONS ACTING ON BEHALF OF THE CORPORATION, FOR THE BENEFIT OF THE CORPORATION, AND WITHIN THE SCOPE OF THEIR AUTHORITY, THE CORPORATION IS CRIMINALLY LIABLE FOR SUCH SALES

Petitioner argues that a corporation cannot be held liable for an offense requiring criminal intent unless it is shown that its "governing of-

ficers"[11] participated in the transaction (Br. 32–52). It implements its argument by pointing out that the only officer of petitioner corporation whose name is mentioned in the record was acquitted of the charges made against him and asserts that none of the sales was made by as high an employee as a branch manager.

Preliminarily it may be observed that petitioner did not take any specific exception to the charge of the trial court that any salesman had assumed authority to represent the corporation and that the corporation was liable for a sale effected by any one of the salesmen (R. 241).[12] Nor did it ask for any instruction embodying the theory of corporate liability which it now urges. The point is not discussed in petitioner's brief in the circuit court of appeals and is not considered in either of the opinions in that court. Additionally, it may be pointed out that Nathan Lotto, conceded by petitioner's president to be the poultry manager (R. 165, 173; see also R. 197), admitted that he made the sales of chickens upon which the three Braverman counts were predicated (R. 197).

Aside from these considerations, petitioner's argument is based, principally, on a misinterpretation of the decision of this Court in *Lake Shore etc. Railway Co.* v. *Prentice*, 147 U. S.

[11] Petitioner defines this term as meaning a general manager or other representative "wielding the whole executive power of the corporation" (Br. 48).

[12] After taking certain specific exceptions, petitioner merely entered a general exception to the entire charge (R. 243–244).

101. That decision merely holds that the malice necessary to sustain a verdict for punitive damages[13] against a corporation must be brought home to the governing officers of the corporation (147 U. S. at page 111); it does not hold, as petitioner claims, that the intent of an agent who is not a governing officer may never be imputed to the corporation. On the contrary, the decision specifically declares:

> A corporation may even be held liable for a libel, or a malicious prosecution, by its agent within the scope of his employment; and the malice necessary to support either action, if proved in the agent, may be imputed to the corporation. (147 U. S. at pages 109–110.)

As pointed out by Judge Edgerton in his article entitled *Corporate Criminal Responsibility*, 36 Yale Law Journal 827 (1927), the courts, in the past 75 years, "have progressed from very narrow views to or toward broad views of corporate criminal responsibility." The decision of this Court in *New York Central Railroad* v. *United States*, 212 U. S. 481, indicates that, in the federal courts, the criminal liability of a corporation is the same as its ordinary tort liability, i. e., that a corporation may be held criminally responsible for the acts of

[13] The Court stated that punitive damages may be awarded "if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligation" (147 U. S. at page 107).

its agents while acting within the scope of their employment in the business of the corporation. See, also, *Egan* v. *United States*, 137 F. 2d 369, 379 (C. C. A. 8), certiorari denied, 320 U. S. 788, where the court stated: "There is no longer any distinction in essence between the civil and criminal liability of corporations, based upon the elements of intent or wrongful purpose." While it is true that the *New York Central* case did not involve a crime requiring intent, the discussion of tort liability in that case indicates that the intent of an agent may be imputed to the corporation in criminal cases just as it may be in tort cases. A number of Circuit Courts of Appeals have applied the general principle enunciated in the *New York Central* case to crimes in which intent is a necessary element of the offense. *C. I. T. Corp.* v. *United States*, 150 F. 2d 85, 89–90 (C. C. A. 9); *Egan* v. *United States*, 137 F. 2d 369, 379 (C. C. A. 8), certiorari denied, 320 U. S. 788; *Minnisohn* v. *United States*, 101 F. 2d 477, 478 (C. C. A. 3); *Joplin Mercantile Co.* v. *United States*, 213 Fed. 926, 935–936 (C. C. A. 8), affirmed, 236 U. S. 531.[14] Although some of these cases do happen to involve higher

[14] Since a corporation can act only through agents, the problem of corporate criminal responsibility is not the same as that of the criminal responsibility of an individual for the acts of his agent. This is recognized by the authorities upon which petitioner relies (Br. 33–36, 38). See Sayre,

corporate officials, the decisions are not based on this circumstance but on the fact that the agents were acting on behalf of the corporation within the scope of their employment. In *Zito* v. *United States*, 64 F. 2d 772, 775 (C. C. A. 7), a corporation was held criminally liable for conspiracy, a crime requiring intent, on the basis of sales effected by a salesman. That decision rests, not on the finding that superior corporate officers participated in the transactions, but on the ground that the salesman was acting for the corporation in the scope of his employment.

The extent to which an agent may render the corporation criminally responsible depends on the nature of the act for which liability is to be imposed. The question is fully discussed by the Ninth Circuit in the *C. I. T.* case, *supra*, in which a national corporation was held criminally liable for the acts of a branch manager in causing fraudulent F. H. A. applications to be made even though the applications were transmitted to the Government, not by him, but by higher corporate officers. The court held that evidence that the higher officers did not know of the branch manager's frauds and that the branch manager acted contrary to instructions, was irrevelant and properly excluded. As that decision points out, the rule applied in the federal courts is that stated by Jus-

Criminal Responsibility for Acts of Another, 43 Harv. L. Rev. 689 and 721; Mechem, *Agency*, Vol. 2, 2d ed., sec. 2008 at p. 1579 n. 76.

tice Atkin in *Mousell Bros.* v. *London and Northwestern Railway Co.*, 2 K. B. (1917) 836, 846:

> When a penalty is imposed for the breach of the duty, it is reasonable to infer that the penalty is imposed for the default of a person by whom the duty would ordinarily be performed.

In this case the offenses involved were sales, and the persons performing the duty to sell were necessarily salesmen. It is clear that these salesmen, in requiring retailers to take chicken skins and chicken feet as a necessary condition to the sale of poultry, were acting within the scope of their employment, in the course of petitioner's business, for petitioner's benefit. Petitioner's president admitted that he told the salesmen to sell feet and skin, that the products sold were corporate products, and that the money received was retained by the corporation (R. 187–189). The intent of the salesmen was therefore properly imputed to the corporation.

The crime here charged is a misdemeanor, not involving moral turpitude. The term "willfully" as used in Section 205 (b) of the Emergency Price Control Act means no more than that the act constituting a violation must be knowingly and intentionally performed; that no proof of evil purpose was required. *Zimberg* v. *United States,* 142 F. 2d 132, 137 (C. C. A. 1), certiorari denied, 323 U. S. 712. See also *Browder* v. *United States,* 312 U. S. 335, 341. Just as, in fixing civil lia-

bility, there is a recognized distinction between the specific intent, such as an intent to prosecute falsely, which will support an action in tort, and the additional malice necessary to sustain punitive damages, so in interpreting criminal statutes punishing willful conduct, this Court has recognized that some offenses require merely intentional conduct, whereas others require an evil motive as well. *Screws* v. *United States*, 325 U. S. 91, 101; *Hartzel* v. *United States*, 322 U. S. 680, 686; *Spies* v. *United States*, 317 U. S. 492, 497; *Browder* v. *United States*, 312 U. S. 335, 341. Hence, even if, as petitioner contends, the principles laid down in respect of the liability of corporations for punitive damages should be applied in determining criminal responsibility, we think that such a rule would require participation of the governing officers of a corporation only where an evil purpose is a necessary element of the crime. See, for example, *American Socialist Soc.* v. *United States*, 266 Fed. 212, 214 (C. C. A. 2), certiorari denied, 254 U. S. 637, where the jury was instructed that the corporation was not guilty of a violation of the Espionage Act unless the board of directors or membership of the corporation authorized the obstruction of the recruitment and enlistment services.[15]

[15] The evidence in this case would undoubtedly warrant a finding that responsible corporate officials were aware of and participated in the practices upon which the petitioner's conviction was based. The facts that the feet and skin were made available for the holiday season, that rationing of

This is not such a case. Considering the purpose of the Emergency Price Control Act to protect the general public from the effects of inflation, the nature of the act prohibited, and the fact that a violation is made merely a misdemeanor, we think it is clear that no such culpable intent is required as would justify a strict rule of corporate responsibiity. Cf. *United States* v. *Illinois Central R. Co.*, 303 U. S. 239, 242, in which a railroad was held liable for a penalty imposed for willful conduct because of the default of its yardmaster. Salesmen authorized to sell could therefore bind the corporation for sales constituting violations of maximum price regulations.

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turkeys, had been agreed upon with petitioner's president, that various salesmen acted in the same manner, that the bills issued were corporate bills, and that the money was accepted by the corporation, indicate a deliberate plan by persons in charge, as well as a ratification of the transactions. The acquittal of petitioner's president in no way negatives this inference because it is clear that the prosecutor acted on the theory that he had to prove personal participation of the president in the actual sales (see R. 233), and the jury apparently found that such fact was not proved. Moreover, a corporation may be found guilty even if its responsible officers are acquitted. *United States* v. *General Motors Corporation*, 121 F. 2d 376, 411 (C. C. A. 7), certiorari denied, 314 U. S. 618.

III

THE ACQUITTAL OF PETITIONER'S PRESIDENT RENDERS ACADEMIC THE QUESTION WHETHER IT WAS REVERSIBLE ERROR FOR THE TRIAL JUDGE TO REFUSE DEFENSE COUNSEL AN OPPORTUNITY TO EXAMINE STATEMENTS SHOWN TO GOVERNMENT WITNESSES IN AN EFFORT TO REFRESH THEIR RECOLLECTION AS TO THEIR TRANSACTIONS WITH THE PRESIDENT

Petitioner's president, Max Kraus, was named as a codefendant in the first information covering the Moskowitz, Braverman and one of the Zweben transactions (R. 2–5). Braverman was the first of these witnesses to take the stand. He testified to purchases of turkey, chicken, and chicken feet as set forth in the Statement, *supra*, and stated that the bookkeeper, "Oscar," had given him the bills for these commodities (R. 86). He denied that he had previously told an O. P. A. investigator that his dealings were with Max Kraus personally (R. 89). Subsequently, he was asked to read Government's Exhibit 13 for identification (a statement signed by him before an O. P. A. investigator) (R. 96–97, 100–103), but he stated that he had difficulty in reading handwriting (R. 90). He was then shown a typewritten paper (a transcript of questions put to the witness by the Assistant United States Attorney and the answers given by him R. 92–95) and was requested to read it (R. 90–91). At this point there ensued the following colloquy between court and defense counsel (R. 91):

> Mr. Sahn: I ask now that that testimony be shown to me before the witness testifies

as to it. Under the decision of the Supreme Court in *United States* v. *Socony Vacuum Oil Company*, where it was held that where the grand jury minutes are used to refresh a witness's recollection——

Mr. McAuley: These are not grand jury minutes.

Mr. Sahn—it is discretionary with the Judge whether or not such minutes might be used to refresh his recollection, and I am not questioning your Honor's discretion here in allowing this witness's recollection to be refreshed, but the court also held that under such circumstances opposing counsel is entitled to see a copy of the minutes.

The Court: I haven't been exercising any discretion. I would hold that the United States had an absolute legal right to insist on doing precisely what it has done. I will deny your application, which I understand is for permission to read what the witness has read.

Mr. Sahn: My application is to read then the original affidavit allegedly signed by that witness on which those questions and answers are based.

The Court: I do not even know that there was an affidavit signed by him. I deny your application no matter how you phrase it, if it is to read the matter that has just been presented to the witness.

Mr. Sahn: Exception.

Braverman was asked whether a reading of the paper refreshed his recollection, and he replied

affirmatively (R. 91). He then testified that at the time of his purchases, he had not spoken to anyone (R. 92). The Assistant United States Attorney read some questions and asked the witness whether he had put these questions to him on April 19 (R. 92–93). The witness affirmed the questions and answers until the prosecutor read the question, "What conversations did you have with Kraus?" As to this, the witness answered "I don't remember that" (R. 93). The question was again read, and the witness answered "With Kraus people, not with Kraus alone, because I never talked to the man" (R. 93). After some further questions were read, the court directed the Assistant United States Attorney to discontinue (R. 94). The next day, the witness was again shown Exhibit 13 for identification (R. 96), and he stated that he understood some of it (R. 98–99). He was then asked whether Max Kraus was present when he bought the chickens, and he replied that he had not seen him (R. 99–100). Petitioner's counsel did not cross-examine Braverman (R. 100).

The Government attempted to offer Braverman's signed statement in evidence after an O. P. A. investigator had testified to the circumstances under which it was taken (R. 100–103). At that time the exhibit was shown to petitioner's counsel (R. 103). The trial judge excluded the exhibit on the ground that it was no proof of its contents (R. 103).

When Moskowitz testified, he was asked with whom he had conversed and who had given him the two bills for turkey and chicken feet. After stating that he had not seen Max Kraus and after failing to identify the man who gave him the tickets (R. 111–112), Moskowitz was shown Government's Exhibit 16 for identification,[16] and he acknowledged his signature (R. 113). He was then asked whether it refreshed his recollection as to the person who handed him the bills and with whom he conversed (R. 113); and he testified that the tickets were made out by two different people but that he could not remember who filled them out (R. 114–116). Defense counsel did not request permission to examine this exhibit. Moskowitz was then asked whether the exhibit refreshed his recollection as to the presence of Max Kraus on November 24, and he answered that Max Kraus was not present (R. 116). Some of the questions put to him by the United States Attorney and the answers he gave were read to him (R. 116–118). He acknowledged his answers until the prosecutor read the question "When M. Kraus said 'I have four barrels of chicken feet for you,' did you say 'What am I going to do with them?'" He testified that the question had been put to him but denied that he had answered

[16] This exhibit apparently consisted of two documents, one a statement given by the witness to an O. P. A. investigator in December 1943, and the other a transcript of an interview with the United States Attorney in April 1944 (R. 113–115, 116).

"That's right" (R. 118–119). When another question and answer were read in which the name of Max was mentioned, the witness said the name should have been McNamara (R. 119). After other questions and answers were read in which the name of Max Kraus was mentioned (R. 119–121), Moskowitz was again handed one of the papers and asked whether he recalled anything about the transactions (R. 121), to which he replied "I am just trying to figure out who marked these tickets and then I can tell you the whole story on that part, but I just can't remember who marked these tickets" (R. 122). On cross-examination he stated that he did not remember seeing Max Kraus that day; that when he referred to Kraus in his talk with the United States Attorney, he meant the firm and not the individual (R. 128–130). On redirect examination his attention was directed to nine words of Exhibit 16 for identification, but, at the judge's direction, he was not permitted to read them aloud (R. 133–134). After further examination about those words (R. 134–137), he testified that they might be true, that he might have been waited on by Max Kraus but that he was not certain (R. 138–1393).

Zweben was also asked whether he saw Max Kraus on November 22 and answered that he thought that Kraus was there (R. 146–147). He was asked whether Kraus was present on November 24 (the date of the sale charged against Kraus personally) and he replied that he could not re-

member whether it was the 22d or 24th (R. 149). He was shown a signed statement and was asked whether it refreshed his recollection (R. 152). He then testified that he saw Kraus but did not speak to him (R. 152–153).

During the prosecutor's summation, in apparent rebuttal to defense counsel's statement that he could not understand why Max Kraus had been mentioned in one information and not in the other, the United States Attorney referred to the fact that only some witnesses had made statements showing dealings with Kraus personally (R. 233). The Court on its own motion stated: "* * * I instruct the jury now that as a statement of fact the contents of those statements, if they were made, are not before you as the District Attorney's statement as to what they contain is not to be considered by any of you" (R. 234). Max Kraus was acquitted by the jury (R. 245).

We do not dispute petitioner's contention that the trial judge had discretion to permit counsel to examine the statements and that, in a situation such as this, where they were handed to the witness, it would have been better procedure to allow defense counsel to see them unless there were compelling reasons for a contrary ruling. *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 231–237: Wigmore on *Evidence*, 3d ed., sec. 762. However, the acquittal of Max Kraus eliminates from the case the question of whether the failure to permit examination of these documents was

prejudicial error. The statements were used for only one purpose, to have the witnesses testify that they had dealt with Max Kraus personally. All these witnesses had already testified to the circumstances of their purchases of poultry and chicken feet or skin before the prosecutor asked them about their dealings with Max Kraus and showed them their affdavits in an attempt to refresh their recollection on this one point. Only slight evidence of the transactions which did not relate to Max Kraus personally came into the record as the questions and answers were read to the witnesses, and such evidence added nothing to the testimony which the witnesses had already given before the statements were shown to them. The United States Attorney never succeeded in getting the witnesses to testify in accordance with their statements except for Moskowitz's final limited admission that Max Kraus might have been present and Zweben's testimony that he saw Kraus but did not speak to him. The judge never allowed the contents of the statements to be accepted as evidence, and specifically instructed the jury to such effect. That the jury followed the admonition of the court and did not credit the qualified admissions by Moskowitz and Zweben is shown by the fact that it acquitted Kraus. As we have shown in point II (*supra*), it was not necessary to the Government's case to prove that Kraus, as a governing officer of the corporation, participated in the transactions, and the jury could not

have thought so for the court instructed them that any salesman had assumed authority to represent the corporation, and that the corporation was liable for a sale effected by any one of the salesmen (R. 241). As the judge told the jury, the one issue in the case was whether the admitted sales of chicken feet and chicken skin were voluntary or compelled (R. 241). The presence or absence of Max Kraus had no bearing on that question.

IV

THE PROSECUTOR'S INCORRECT STATEMENT OF THE MAXIMUM PENALTY APPLICABLE TO THE OFFENSES CHARGED WAS CURED BY THE COURT'S DIRECTION TO THE JURY TO DISREGARD POSSIBLE PENALTIES

In his closing argument, Government counsel stated that he thought the defense had resorted to a shabby trick in referring to the possibility of a five-year prison sentence against Max Kraus individually when there was no likelihood that any such sentence would be imposed. He stated, "That is none of your business, none of mine, that is, the jail sentence involved. * * * The maximum for each count in this court on this charge is one year in jail and a $1,000 fine. * * *" (R. 233). The maximum fine for each offense is in fact, $5,000, but the mistake was not called by petitioner to the attention of Government counsel or the court before the jury retired (cf. R. 247).

Petitioner contends that the prosecutor's misstatement may have induced conviction of the corporation and that the error should at least

call for a reduction of the fines imposed (Br. 57–58).

However, at the very opening of his charge the trial judge told the jury (R. 235):

> You will make up your minds solely and wholly on what you find the testimony to be. You are not to consider the penalty or the possible penalty in this case. Both lawyers, in my opinion, should not have told you about it.

Subsequently, he again instructed the jury (R. 236):

> * * * You are the ones that are to judge the case, and you are to do that not from any extraneous consideration such as the penalty, because that is none of the jury's business. It has nothing to do with justice. You exercise the prerogative of doing justice between the two contenders in this case. You have nothing to do with the penalty. That is entirely up to me. Please do not consider it. As I said, that is none of the jury's business.

Since it must be presumed that the jury followed the judge's instruction,[17] the explicit and reiterated instruction not to consider the penalty cured the error in the prosecutor's summation. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 243, *Sawyer* v. *United States*, 202

[17] *Hines* v. *United States*, 131 F. 2d 971, 974 (C. C. A. 10); *Landay* v. *United States*, 108 F. 2d 698, 706 (C. C. A. 6), certiorari denied, 309 U. S. 681; *Suhay* v. *United States*, 95 F. 2d 890, 895 (C. C. A. 10), certiorari denied, 304 U. S. 580.

U. S. 150, 168; *Dunlop* v. *United States,* 165 U. S. 486, 498; *Moore* v. *United States,* 132 F. 2d 47, 48 (C. C. A. 5), certiorari denied, 318 U. S. 784; *Landay* v. *United States,* 108 F. 2d 698, 706 (C. C. A. 6), certiorari denied, 309 U. S. 681.

As the court below indicated (R. 272), the assessment of $2,500 upon each of the nine counts upon which petitioner corporation was convicted bore a relation to the total income derived by the corporation from the sale of the extra commodities. (See R. 246–247.)

CONCLUSION

The case was tried upon correct principles of law and there were no reversible trial errors. We therefore respectfully submit that the judgment of the court below should be affirmed.

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DECEMBER, 1945

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SUPREME COURT OF THE UNITED STATES.

No. 198.—October Term, 1945.

M. Kraus & Bros., Inc., Petitioner, vs. United States of America. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 25, 1946.]

Mr. Justice Murphy announced the conclusion and judgment of the Court.

The problem here is whether the petitioner corporation was properly convicted of a crime under the Emergency Price Control Act of 1942.[1]

The petitioner is engaged in the wholesale meat and poultry business in New York City. Poultry is a commodity subject to the provisions of Revised Maximum Price Regulation No. 269,[2] promulgated by the Price Administrator pursuant to Section 2(a) of the Emergency Price Control Act of 1942. Two informations, each containing six counts, were filed against petitioner. Each count alleged that, as an integral part of a specified sale of poultry on a day during the Thanksgiving season in November, 1943, the petitioner "unlawfully, wilfully and knowingly evaded the provisions of said Revised Maximum Price Regulation No. 269, Sec. 1429.5, by demanding, compelling and requiring" the retail buyer to purchase chicken feet or chicken skin at a specified price as a condition of the sale of the poultry. Petitioner's president was named as a co-defendant in the first information and the two informations were consolidated for trial purposes.

The theory of the Government is that the petitioner was guilty of an evasion of the price limitations set forth in this particular regulation if it required the purchase of chicken feet and skin as a necessary condition to obtaining the primary commodity, the poultry. This practice is commonly known as a "combination sale" or a "tying agreement." It is argued that the petitioner thereby received for the poultry the ceiling price plus the price of the secondary commodities, the chicken parts.

[1] 56 Stat. 23; 50 U. S. C. App. § 901 *et seq.*

[2] 7 Fed. Reg. 10708; reissued with amendments, 8 Fed. Reg. 13813.

The evidence was undisputed that the poultry was billed by petitioner at ceiling prices fixed by the Price Administrator and that no ceiling prices had been set for chicken feet or chicken skin. It was also undisputed that the demand for poultry during the Thanksgiving season far exceeded the supply and that petitioner voluntarily imposed a rationing system among its customers.

The Government's case rested primarily upon the testimony of seven retail butchers who had purchased poultry and poultry parts from petitioner during the period in question. Only one of them testified explicitly that the sale of poultry to him had been conditioned upon the sale of poultry parts which he did not want and for which there was no consumer demand. His testimony, however, was disbelieved by the jury since it acquitted the petitioner on the two counts involving sales to him. With two exceptions, the other butchers testified either that the feet and skins were loaded on their trucks without previous order or solicitation along with the poultry or that they were billed for both the poultry and the parts without comment. Five of them stated that they sold a small amount of the chicken parts and gave away the balance; one remarked that he could not sell any parts and was forced to dump them. There was no explicit evidence that any of the butchers protested, sought to return the chicken parts or asked to buy the poultry separately. It was reasonable, however, for the jury to find that the sale of poultry was conditioned upon the simultaneous sale of the chicken parts and no contrary claim is made before us.

Several times the petitioner tried to introduce testimony establishing that there was a demand for chicken parts and that they were of value. Petitioner's counsel stated that "The government has inferred through all of its testimony that chicken skin and chicken feet are so much waste, that they are dumped; that they are not used and they have opened up the door to this type of testimony." But the trial judge ruled that the Government had not put that matter in issue and that the "only thing we are concerned with is whether or not the witnesses who testified purchased chicken feet to meet a demand in their stores." He accordingly refused to admit the proferred testimony from petitioner's witnesses, stating to petitioner's counsel that "I direct you not to put them on the stand."

On cross examination, however, petitioner's president was questioned as to the resale value of chicken skins from the retailer to

the general public. He stated that the value was from 25 to 30 cents a pound and that the skin was used to make chicken fat. He also testified that chicken feet had a resale value of from 12 to 16 cents a pound and were used in making soup and gelatin. He further stated that the demand for chicken feet came from retail butchers such as had been on the stand. Petitioner's counsel then recalled one of the retail butchers whose testimony previously had been excluded by the court. He testified that he had bought chicken feet from the petitioner, had "created a demand" for them in his store, and had sold them for from 15 to 20 cents a pound. No further witnesses were called in regard to the retail value of chicken feet and skins.

In submitting the case to the jury, the judge stated that "what these defendants are charged with having done is imposing as a necessary condition to the purchase of turkeys the simultaneous purchase of gizzards, chicken feet or chicken skin, that were utterly useless and valueless to the purchasers. In order to violate the law these defendants must have made more than the fixed price of 37½ cents on the chickens, or the turkey price of 40 to 45 cents. And the testimony about the use of these additional articles sold, the use that can be made of them, will enable you to determine that they were sold at prices—and the prices are on all these slips that are in evidence—entirely out of line with any value that attaches to them, so that it is almost entirely profit to these defendants, and in doing that, by making the purchase of these things at the prices fixed, the defendants both realized a greater consideration than the Office of Price Administration allows for the commodity sold." He also told the jury that the "one question in the case is whether the sale of the chicken skin and feet was a necessary condition to the purchase of the other [poultry]."

The jury acquitted petitioner's president but convicted the petitioner on nine counts. Petitioner was fined $2,500 on each count, a total of $22,500. The conviction was affirmed by the court below, one judge dissenting because of the exclusion of petitioner's proffered testimony. 149 F. 2d 773. In our opinion, however, the conviction must be set aside.

Section 205(b) of the Emergency Price Control Act of 1942 imposes criminal sanctions on "Any person who willfully violates any provision of section 4 of this Act." Section 4(a) of

the Act in turn provides that "It shall be unlawful . . . for any person to sell or deliver any commodity, . . . in violation of any regulation or order under section 2 . . ." Section 2(a) authorizes the Price Administrator under prescribed conditions to establish by regulation or order such maximum prices "as in his judgment will be generally fair and equitable and effectuate the purposes of this Act." Section 2(g) further states that "Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof."

The Price Administrator, pursuant to Section 2(a), issued Revised Maximum Price Regulation No. 269 on December 18, 1942,[3] which regulation was in effect at the time the poultry sales in question were made. Section 1429.5 of this regulation, referred to in the informations, stems from Section 2(g) of the Act. It is entitled "Evasion" and reads as follows: "Price limitations set forth in this Revised Maximum Price Regulation No. 269 shall not be evaded whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to, the commodities prices of which are herein regulated, alone or in conjunction with any other commodity, or by way of commission, service, transportation, or other charge, or discount, premium, or other privilege or other trade understanding or otherwise."

The manifest purpose of Congress in enacting this statute was to preserve and protect the economic balance of the nation during a period of grave emergency, thereby achieving the prevention of inflation and its consequences enumerated in Section 1. *Yakus* v. *United States*, 321 U. S. 414, 423. That aim was implemented by criminal sanctions to be imposed on those who deliberately choose to ignore the national welfare in this respect by selling commodities at prices above established levels. As appears from a combined reading of Sections 205(b), 4(a) and 2(a), criminal liability attaches to any one who willfully sells commodities in violation of a regulation or order of the Price Administrator establishing maximum prices.[4] Cf. *United States* v. *Eaton*, 144 U. S.

[3] Reissued with amendments on October 8, 1943. See note 2.

[4] Section 205(b) is somewhat inartistically drawn. It does not specifically impose criminal liability on those who violate the regulations and orders of the Administrator. But the hurdle of United States *v.* Eaton, 144 U. S. 677, is cleared by the reference in Section 205(b) to Section 4, which makes it

677. Recognizing that sales at above-ceiling prices may be accomplished by devious as well as by direct means, Congress in Section 2(g) authorized the Administrator to make provisions against circumvention and evasion of maximum prices. Hence one who willfully sells commodities at prices above the maximum in an evasive manner specified by the Administrator subjects oneself to criminal liability. These statutory warnings are clear and unambiguous. When incorporated with such definite and clear regulations and orders as the Administrator may promulgate, the provisions of the Act leave no doubt as to the conduct that will render one liable to criminal penalties.

This delegation to the Price Administrator of the power to provide in detail against circumvention and evasion, as to which Congress has imposed criminal sanctions, creates a grave responsibility. In a very literal sense the liberties and fortunes of others may depend upon his definitions and specifications regarding evasion. Hence to these provisions must be applied the same strict rule of construction that is applied to statutes defining criminal action. In other words, the Administrator's provisions must be explicit and unambiguous in order to sustain a criminal prosecution; they must adequately inform those who are subject to their terms what conduct will be considered evasive so as to bring the criminal penalties of the Act into operation. See *United States* v. *Wiltberger*, 5 Wheat. 76, 94-96. The dividing line between unlawful evasion and lawful action cannot be left to conjecture. The elements of evasive conduct should be so clearly expressed by the Administrator that the ordinary person can know in advance how to avoid an unlawful course of action.

In applying this strict rule of construction to the provisions adopted by the Administrator, courts must take care not to construe so strictly as to defeat the obvious intention of the Administrator. Words used by him to describe evasive action are to be given their natural and plain meaning, supplemented by con-

unlawful, among other things, to sell or deliver any commodity in violation of any regulation or order. See In re Kollock, 165 U. S. 526; United States v. Grimaud, 220 U. S. 506; United States v. George, 228 U. S. 14; Singer v. United States, 323 U. S. 338. Congress has subsequently emphasized this reference even more clearly when, in adding Section 204(e)(1) to the Emergency Price Control Act, it spoke of a criminal proceeding "brought pursuant to section 205 involving alleged violation of any provision of any regulation or order issued under section 2." Section 107(b), Stabilization Extension Act of 1944, 58 Stat. 639. See also Section 6, Act of June 30, 1945, Public Law 108, amending Section 204(e)(1) of the Emergency Price Control Act.

temporaneous or long-standing interpretations publicly made by the Administrator. But patent omissions and uncertainties cannot be disregarded when dealing with a criminal prosecution. A prosecutor in framing an indictment, a court in interpreting the Administrator's regulations or a jury in judging guilt cannot supply that which the Administrator failed to do by express word or fair implication. Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language. The prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act. Congress has warned the public to look to that source alone to discover what conduct is evasive and hence likely to create criminal liability. *United States* v. *Resnick*, 299 U. S. 207.

In light of these principles we are unable to sustain this conviction of the petitioner based upon Section 1429.5 of Revised Maximum Price Regulation No. 269. For purposes of this case we must assume that the Administrator legally could include tying agreements and combination sales involving the sale of valuable secondary commodities at their market value among the prohibited evasion devices. Any problem as to his power so to provide would have to be raised initially in a proceeding before the Emergency Court of Appeals. *Lockerty* v. *Phillips*, 319 U. S. 182; *Yakus* v. *United States*, 321 U. S. 414, 427-431; *Bowles* v. *Seminole Rock Co.*, 325 U. S. 410, 418-419; *Case* v. *Bowles*, — U. S. — (slip opinion, p. 3). The only issue bearing upon the regulation which is open in this criminal proceeding is whether the Administrator did in fact clearly and unmistakably prohibit tying agreements of this nature by virtue of the language he used in Section 1429.5. That issue we answer in the negative.[5]

Section 1429.5, so far as here pertinent, provides that price limitations shall not be evaded by any method, direct or indirect, whether in connection with any offer or sale of a price-regulated commodity alone "or in conjunction with any other commodity," or by way of any trade understanding "or otherwise." No specific mention is made of tying agreements or combination sales.

It is urged by the Government that this language fits the type of tying agreement allegedly used by petitioner. The contention

[5] Cf. United States v. George F. Fish, Inc., — F. 2d — (C. C. A. 2, Feb. 8, 1946).

is that petitioner received for the primary commodity not only the ceiling price but also the price of the secondary commodities which the retailers were required to buy. Conversely, the retailers were compelled to pay not only the ceiling price but also the price of the secondary commodities in order to secure the primary commodity, the poultry. Under this theory it is immaterial whether the secondary products, the chicken parts, had any value to the retailers or whether their price was a reasonable one. Reference is made in this respect to Section 302(b) of the Act, defining price as "the consideration demanded or received in connection with the sale of a commodity." Hence it is concluded that the price limitation on the primary commodity was evaded "in conjunction with any other commodity" within the meaning of Section 1429.5. This argument, moreover, represents the consistent interpretation of the Administrator.[6]

But we do not believe that, under the strict rule of construction previously discussed, such an interpretation of Section 1429.5 is dictated by its plain language. It prohibits evasions through sales of price-regulated commodities "in conjunction with any other commodity." That clearly and undeniably prohibits evasions through the use of tying agreements where the tied-in commodity is worthless or is sold at an artificial price, thereby hiding an above-ceiling price for the primary commodity. But to say that the language covers more, that it also applies to a case where the secondary product has value and is sold at its ceiling or market price, is to introduce an element of

[6] The Price Administrator has consistently maintained the position that compulsion to purchase a secondary product is an evasion of the maximum prices fixed for the primary product. Thus, in an interpretation issued November 5, 1943, applicable to all maximum price regulations, the Administrator, in discussing violations and evasions, made the following interpretation as to tying agreements:

"(a) *As to freeze regulations*: A purchaser may not be required to buy a combination of commodities if he was not required to do so during the base period, because such an arrangement is a tying agreement which results in the seller receiving a larger consideration for his commodity than he charged during the base period.

"(b) *As to regulations other than base period freeze regulations*: OPA has also consistently held that any arrangement by which a seller conditions the sale of a commodity in any manner upon the purchase by the buyer of any other commodity is a tying agreement, and constitutes a violation.

"*For example*, it is a violation for a seller to compel a purchaser of a load of corn to also purchase a load of alfalfa, even though the total price for the corn, plus the alfalfa, does not exceed the aggregate of the ceiling price for each item, or another example: It is a violation for a seller to compel a purchaser of nylon hose to also purchase a war bond."

O. P. A. Service (Pike & Fischer) vol. I, p. 2:812.

conjecture and to give effect to an unstated judgment of policy.

The language of Section 1429.5 is appropriate to and consistent with a desire on the Administrator's part to prohibit only those tying agreements involving tied-in commodities that are worthless or that are sold at artificial prices. The Administrator may have thought that other tied-in sales did not constitute a sufficient threat to the price economy of the nation to warrant their outlawry, or that they were such an established trade custom that they should be recognized. But we are told that he had no such thought, that prohibition of all tying agreements is essential to prevent profiteering, and that this blanket prohibition is the only policy consistent with the purposes of the Act. All of this may well be true. But these are administrative judgments with which the courts have no concern in a criminal proceeding. We must look solely to the language actually used in Section 1429.5. And when we do we are unable to say that the Administrator has made his position in this respect self-evident from the language used.

The Administrator's failure to express adequately his intentions in Section 1429.5 is emphasized by the complete and unmistakable language he has used in other price regulations to prohibit all tying agreements, including those involving the sale of valuable secondary products. Thus he has inserted in the meat regulation a provision prohibiting evasion of price limitations by "offering, selling or delivering beef, veal or any processed product on condition that the purchaser is required to purchase some other commodity." Section 1364.406, Revised Maximum Price Regulation No. 169, as amended March 30, 1943, 8 Fed. Reg. 4099. And in the clothing regulation, the Administrator has provided that "No manufacturer shall make a sale of garments which is conditioned directly or indirectly on the purchase of any other commodity or service." Section 15, Revised Maximum Price Regulation No. 287, issued June 29, 1943, 8 Fed. Reg. 9126. See also Section 1389.555, Maximum Price Regulation No. 330, as amended August 7, 1943, 8 Fed. Reg. 11041.

The very definiteness with which tying agreements of all types were prohibited in regard to many other commodities and the absence of any such prohibition in Section 1429.5 of Revised Maximum Price Regulation No. 269 might well have led a reasonable man to believe that tying agreements involving the sale of a valuable secondary commodity at its market price were

permissible in the poultry business when the transactions in question took place. Certainly the language used by the Administrator did not compel the opposite conclusion. And certainly a criminal conviction ought not to rest upon an interpretation reached by the use of policy judgments rather than by the inexorable command of relevant language.

In view of these considerations we interpret Section 1429.5 as prohibiting only those tying agreements involving secondary products that are worthless or that are sold at artificial prices. It follows that the conviction below cannot stand. While the informations can be interpreted as charging a crime under Section 1429.5 as we have read it, the trial judge's charge to the jury was clearly erroneous. There was evidence, at first excluded but later admitted, that the chicken parts which the petitioner sold did have value and were sold at their market price. If the jury believed such evidence it was entitled to acquit the petitioner. But the trial judge charged that the "one" question in the case was whether the sale of the chicken parts was a necessary condition to the purchase of the poultry. On the basis of that charge the jury may well have disregarded as irrelevant the evidence of value as to the secondary products and convicted solely on the ground that there was a tie-in sale. Such a charge is thus reversible error.

There were additional statements in the charge to the jury, to be sure, that the petitioner was charged with having compelled, in connection with the purchase of poultry, the simultaneous purchase of chicken parts "that were utterly useless and valueless to the purchasers" and at prices "entirely out of line with any value that attaches to them." While such statements tended to charge a violation of Section 1429.5, as properly interpreted, they were so intertwined with the incorrect charge as to negative their effect. "A conviction ought not to rest upon an equivocal direction to the jury on a basic issue." *Bollenbach* v. *United States*, — U. S. —, (slip opinion, p. 5).

The case must therefore be remanded for a new trial, allowing full opportunity for the introduction of evidence as to the value of the chicken parts and charging the jury in accordance with the proper interpretation of Section 1429.5.

It is so ordered.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice DOUGLAS, concurring.

If a retailer sold meat or any other commodity to a consumer only on condition that he purchase and pay for a wholly worthless article, it would be clear that price ceilings had been violated. For the attribution of value to the worthless article would be nothing more than an evasive method of increasing the ceiling price on the other commodity. I can see no difference where the additional commodity, although it has value, has no value to the purchaser.

But this case is different in both respects or so the jury might find. First, chicken gizzards, chicken skin, or chicken feet are not wholly worthless articles. There is demand for them and they have a value. Second, they were tied-in with sales to retailers who constitute the market for chicken gizzards, chicken skin, and chicken feet. If in fact they had no value on that market, evasion of price ceilings would be established. But since they apparently had some value on the retail market, no violation of price ceilings occurred unless the price charged for them in fact exceeded that market value. That might be shown either by proof of the fact that the market value was lower or by showing that the quantity forced on the retailers was in excess of the quantity which the market could absorb.

The case should be remanded for a new trial on that basis. For the trial court ruled that the additional articles sold were valueless and that the "one question in the case is whether the sale of the chicken skin and feet was a necessary condition to the purchase of the other." That ruling took from the jury the basic issue in the case.

I think there was evidence that these chicken gizzards, chicken skin, and chicken feet were valueless to some of the retailers and that a conviction would be warranted. But it is not enough that we conclude on the whole record that a defendant is guilty. *Bollenbach* v. *United States*, 326 U. S. ——. The jury under our constitutional system is the tribunal selected for the ascertainment of guilt.

Mr. Justice RUTLEDGE, concurring.

I am in agreement with the result and substantially so with Mr. Justice MURPHY's opinion. I do not think that administra-

tive regulations, given by statute the function of defining the substance of criminal conduct, should have broader or more inclusive construction than statutes performing the same function. If the regulations involved here had been enacted specifically by Congress in statutory form, I do not think they could properly be construed to forbid tie-in sales of these commodities *per se*.

As the opinion points out, the regulations, with reference to other commodities, expressly prohibited tie-in sales, regardless of whether the tied-in commodity had value. Persons dealing in those commodities were specifically informed by the regulations, therefore, that such sales would be in violation of the Act. There was no such specific prohibition applicable at the time of the sales in question to sales of poultry. However the general prohibition against evasion contained in § 1429.5 of Revised Maximum Price Regulation No. 269 might be interpreted, if there had been no regulations specifically forbidding tie-in sales of other commodities, in view of their existence and the absence of any similar provision relating to poultry, I do not think it permissible to construe § 1429.5 as covering the same ground. Persons reading the regulations to determine what conduct had been forbidden were entitled in my opinion to conclude that the Administrator, whenever he thought tie-in sales were *per se* evasive or in violation of the Act's policy, had expressly so stated and conversely that where he had not expressly forbidden the practice, it was not to be understood as prohibited by general language applicable to many other types of situation but not specifically to this one. This view, I think, would be required if the regulations had been enacted in statutory form. As regulations they cannot be given broader content.

Accordingly I agree with the conclusion that tie-in sales were not forbidden at the time of these sales, as to poultry. I also agree that the trial court, both in its instructions and in some of its rulings upon the admissibility of evidence, went on a conception of the law inconsistent with this view. I therefore concur in the Court's disposition of the cause.

Mr. Justice FRANKFURTER, although agreeing with the opinion of Mr. Justice MURPHY, also joins in this opinion.

Mr. Justice BLACK, dissenting.

We were at war in 1943. Scarcity of food had become an acute problem throughout the nation. To keep the public from being gouged the government had set ceiling prices on food items. Congress had made it a crime to sell food above these ceiling prices. When Thanksgiving Day approached there were not enough turkeys to supply the demand of the many American families who wanted to celebrate in the customary style.

The information filed in the district court charged that the petitioner "unlawfully, wilfully and knowingly evaded the provisions of . . ." Revised Maximum Price Regulation No. 269, § 1429.5, by compelling and requiring the buyer to purchase chicken feet, chicken skin, or gizzards at a specified price, as a condition of the sale of poultry to them. During peace times the petitioner had ordinarily done a gross business of seven-and-a-half million dollars a year. In 1943, presumably due to the meat shortage incident to the war, the petitioner's gross business was not quite four million dollars. This meat shortage was felt acutely during the Thanksgiving season, when petitioner instead of his usual 100 to 150 cars of turkeys received only one car. When the retail butchers and poultry market proprietors came clamoring for their share of the small supply (which the defendant rationed among them) they found that along with the turkeys which they wanted so badly petitioner gave and charged them for large amounts of chicken feet, skins and gizzards which they had not asked for at all and which for the most part they had never before sold as separate items. While the butchers paid in addition to the ceiling price charged for the turkeys the price charged for the chicken skins and feet, they did so only because they understood that unless they bought these unwanted items they could get no turkeys. Only one of the butchers sold all the chicken skins to his customers. He explained that he operated his store in a poor neighborhood where the food shortage had become so acute that people were willing to buy anything they could get. As to the rest of the butchers, some simply dumped the chicken skins and feet while others, after diligent efforts, sold a few pounds and then gave the rest away either to their customers, or to charitable institutions. Certainly these particular butchers forced to buy these unwanted items for the first time were not the regular retail outlet for disjointed chicken feet and peeled chicken skins, if

there ever was such an outlet on a voluntary basis. It is clear therefore that as a result of petitioner's forcing his customers to buy the feet and skins along with the turkeys, the retailers' cost price of the turkeys was in effect increased beyond the ceiling.

In my opinion petitioner's practice in forcing the butchers to buy unwanted chicken feet in order to get wanted turkeys amounted to a direct violation of the Price Control Act. It certainly was no less a violation of the Administrator's regulation against evasion. In promulgating this regulation the Administrator could not possibly foresee every ingenious scheme or artifice the business mind might contrive to shroud violations of the Price Control Act. The regulation does not specifically describe all manner of evasive device. The term "tying agreement" nowhere appears in it and a discussion of such agreements is irrelevant. We need not decide whether what petitioner did would have violated every possible hypothetical regulation the Administrator might have promulgated. The regulation here involved prohibits every evasion of the Price Control Act. It thus condemns all actions that are "on the wrong side of the line indicated by the policy if not the mere letter of the law." *Buller* v. *Wisconsin*, 240 U. S. 625, 631. What petitioner did here is on the wrong side of both letter and policy. The Court does not deny that there was ample evidence to support the jury's finding that petitioner did what the information charged it with doing. In my opinion that was a crime.

Had butchers been required to buy bags of stones as a condition to buying turkeys, I think it would have been hard to persuade them, or anybody else, that the seller who forced them to do so was not guilty of violating and evading the law. Had people who wanted and needed bacon, at the time when bacon was almost impossible to purchase, been required to buy hog hoofs and hog skins with each purchase of a pound of bacon, I think the sellers would have violated the law. If the wholesaler can require the retailer to purchase unwanted items the retailer can force the ordinary consumer to do the same thing. A restaurant could then force its customers to purchase used kitchen fats along with their meals. It would be little consolation to a customer forced to do so to learn that soap factories can use these fats and would be willing to purchase them. He would pay the price, and either dump the fat into the nearest ashcan or tell the waiter to take

the smelly substance away. The result would be increased cost of meals in that restaurant. Thinly disguised subterfuges like the one here adopted should not be sanctioned by courts. Once they are sanctioned, laws enacted by Congress for the public welfare are no longer respected.

When food is scarce and people are hungry it is a violation, both of the letter and spirit of the Price Control laws, to require consumers or retail stores where they make their purchases, to buy things that they neither need nor want as a condition to obtaining articles which they must have. I dissent from the Court's disposition of this case.

Mr. Justice REED and Mr. Justice BURTON join in this opinion.